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No. 06-189

In The

Supreme Court of the United States

ROBIN ELAINE POLITO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari
To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The public has a right to be protected from the human and economic costs caused by drunk drivers and accordingly states have a compelling interest to enforce drunk driving laws.

However, in the pursuit of this important public safety cause, this case represents three important questions that impact all citizens within Pennsylvania and across the United States.

1. Whether it is permissible for the Commonwealth of Pennsylvania; its law enforcement agencies and judiciary to ignore its own laws; take constitutional shortcuts and arrest, prosecute and convict thousands of innocent people a year by depriving them of equal protection and due process arising from a lack of standards and uniformity in the collection, handling, preservation and testing of the legal blood alcohol specimen?

2. Whether it is permissible for the Pennsylvania Superior Court to enter a decision that conflicts with its prior decisions on evidence suppression issues; ignores applicable Pennsylvania statutes requiring a properly preserved blood specimen and sanctions a departure by a lower court that represented an abuse of judicial discretion by refusing to suppress the challenged legal blood alcohol evidence?

3. Whether it is permissible for the suppression court to deny the suppression of the challenged legal blood alcohol test result by simply declaring the unrefuted defense evidence on the record as being not credible enough for the Commonwealth of Pennsylvania to respond to, even though the evidence was provided by a forensic toxicology expert

QUESTIONS PRESENTED FOR REVIEW – Continued

witness, accepted by the court and was consistent with Pennsylvania statutes, FDA standards and nationally recognized laboratory guidelines and the Commonwealth acknowledged its burden to respond?

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TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDING BELOW	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	12
CONCLUSION	22

Index to Appendices

Appendix A – Opinion and Order of the Pennsylvania Superior Court....App. 1

Appendix B – Order and Opinion of the Court of Common Pleas of Jefferson County, Pennsylvania Denying Evidence Suppression....App. 14

Appendix C – Order of the Pennsylvania Supreme Court Denying Petition for Allowance of Appeal..App. 22

Appendix D – Order of the Pennsylvania Supreme Court Denying Reconsideration of Petition for Allowance of Appeal....App. 23

Appendix E – Summary Diagram of Pennsylvania Statutes and Applicable Laboratory and Federal Standards Requiring Proper Preservative for Legal Blood Alcohol Specimens....App. 24

TABLE OF CONTENTS – Continued

Page

Appendix F – Flaws and Errors in Pennsylvania Legal Blood Alcohol Collection, Preservation, Handling and Testing.....App. 25

TABLE OF AUTHORITIES

Page

CASES

Bush v. Gore, 531 U.S. 98 (2000) 15

Commonwealth v. Brown, 631 A.2d 1014 (Pa. Super. 1983) 18

Commonwealth v. Serbek, No. 510, Pittsburgh 1997 18

Commonwealth v. Sullivan, 581 A.2d 956 (Pa. Super. 1990) 8

U.S. v. Jannottie, 673 F.2d 578 (3rd Cir. 1982) 24

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. XIV 1

STATUTES AND RULES

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2403(b) 1

42 U.S.C. § 1985(2) 2

42 U.S.C. § 1985(3) 2

28 Pennsylvania Code, § 5.41-5.50 4

28 Pennsylvania Code, § 5.44(a) 2, 13

28 Pennsylvania Code, § 5.52 2

28 Pennsylvania Code, § 5.62 13

75 Pa. C.S. 1547(c)(2)(ii) 2, 13

75 Pa. C.S. 3731(a)(1) 4, 7, 24

75 Pa. C.S. 3731(a)(4)(i) 4, 7, 24

TABLE OF AUTHORITIES – Continued

Page

OTHER

Blood Alcohol Analysis in the Clinical Laboratory Approved Guidelines 1997, National Committee for the Consensus of Laboratory Standards (NCCLS) 14, 20

FDA Database of Recognized Consensus Standards, August 14, 1998, Recognition List Number 002-Devices Affected: Blood Alcohol Testing, Process 510(k) 21

OPINIONS BELOW

The opinion of the highest state court to review the merits was the Superior Court of Pennsylvania, No. 151 WDA 2004 at Appendix A (App. 1-13) affirming the Order entered January 21, 2004, by the Court of Common Pleas of Jefferson County, Pennsylvania, at No. 394-2002 CR at Appendix B (App. 14-21) to the petition and is unpublished.

JURISDICTION

The date on which the highest state court decided my case was September 22, 2005. A copy of that decision appears at Appendix A.

A timely petition for Allowance of Appeal was filed to the Pennsylvania Supreme Court and was thereafter denied on March 14, 2006, and a copy of the order denying the Allowance of Appeal appears at Appendix C. (App. 22)

A timely petition for a Reconsideration of Allowance of Appeal was filed to the Pennsylvania Supreme Court and was thereafter denied on May 25, 2006, and a copy of the order denying rehearing appears at Appendix D. (App. 23)

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) and 28 U.S.C. § 2403(b).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment of the Constitution provides in relevant part: "No State shall . . . deprive any

person of life, liberty, or property, without due process of law."

42 U.S.C. § 1985(2) provides in pertinent part: " . . . or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws. . . ."

42 U.S.C. § 1985(3) provides in pertinent part: "If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws."

28 Pennsylvania Code at Section 5.44(a), Examination of Specimens, provides in pertinent part: "No specimen shall be examined if unsuitable for testing because of improper collection, improper preservation, apparent spoilage, excessive time lapse between collection and examination, when applicable or other reason sufficient to render the findings of doubtful validity."

28 Pennsylvania Code at Section 5.52 provides in pertinent part: "The pertinent regulations require that BAC tests be performed only on properly preserved samples."

Pennsylvania Title 75, Section 1547(c)(2)(ii) states in pertinent part: " . . . so that testing conducted in accordance with the prescribed procedures utilizing the prescribed equipment will be as accurate and reliable as science and technology permit."

STATEMENT OF THE CASE

Although this appeal was initiated on the basis of an erroneous factual finding in that a suppression court denied suppression of evidence contrary to the facts on the record, it involves a state appellate court ruling on appeal in a manner that ignores the factual record and conflicts with how it has decided similar cases and more importantly the basis of the whole appeal arises from a state failing to follow it owns laws and equal protection issues arising from a lack of statewide standards on what constitutes a properly preserved and tested legal blood alcohol specimen to ensure accurate and reliable test results.

On May 23, 2002, Petitioner Robin E. Polito was arrested for suspected DUI and taken to the Brookville Hospital in Brookville, Pennsylvania, where an unlicensed phlebotomist drew her blood to fill two 10ml vacutainers each containing 20mg. of sodium fluoride as the preservative and 10mg. of EDTA as the anticoagulant. The blood alcohol kit was manufactured by NIK, Inc. of Jack nville, Florida, purchased by the Pennsylvania State Police and supplied to the hospital for Brookville Police use in obtaining suspected DUI blood specimens for testing.

After the Petitioner's blood was collected, the arresting police officer took the vacutainers filled with the Petitioner's blood and in the absence of proper training (and contrary to the manufacturer's inserted instructions) shook them several times in the belief he was helping to mix the blood with the chemicals.

The police officer then placed the Petitioner's blood specimens back into the Kit and took them with him back to the police station for later mailing to a Pennsylvania

State Police Crime Laboratory in Erie, Pennsylvania for BAC testing.

The Petitioner's blood specimens were tested approximately seventy-two hours later and the BAC report was reported at an alleged 0.26%. Petitioner was arrested and charged with violation of *75 Pa. C.S. 3731(a)(1) driving while under the influence of alcohol to a degree which renders the person incapable of safe driving* ***and****, 75 Pa. C.S. 3731(a)(4) driving with a blood alcohol greater than 0.10%.* (Emphasis Added)

Petitioner requested and was granted a suppression hearing on January 28, 2003 in order to challenge the prima facie blood alcohol test result. Mindful of previous Pennsylvania court rulings on the issue of BAC evidence that stated, *"Only specific allegations of testing errors, and not general boilerplate objections to the admission of test results will require the Commonwealth to produce evidence of the test's reliability other than by reference to the Pennsylvania Bulletin,"* Petitioner retained a forensic toxicologist as an expert witness.

Pennsylvania Statutes require that blood alcohol testing only be conducted on properly preserved blood specimens. **28 Pa. Code, § 5.41-5.50,** *"No specimens shall be examined if unsuitable for testing because of improper collection, improper preservation, apparent spoilage, excessive time lapse between collection and examination, when applicable, or other reasons sufficient to render the findings of doubtful validity."* (Appendix E – App. 24)

Although the intent of the legislature is clear and unambiguous, Pennsylvania has failed to develop and promulgate any statewide standards, rules, regulations, policies or procedures to ensure the uniform use of a

proper legal blood alcohol kit containing proper levels of blood preservative and anticoagulant; the uniform mixing and handling of the legal blood specimen; the uniform pretesting of the blood specimen to ensure the accuracy and reliability of the reported BAC. (Appendix E – App. 24 and Appendix F – App. 25)

This act of omission by the Commonwealth of Pennsylvania, specifically the Pennsylvania Department of Health, Bureau of Laboratories, Division of Chemistry and Toxicology results in inaccurate and unreliable BAC test results being used to prosecute or coerce a plea bargain and convict and punish countless innocent people of being DUI along with the guilty.

The Petitioner's expert forensic toxicology witness was accepted by the suppression court and testified to six (6) very specific issues as to the accuracy and reliability of Petitioner's alleged blood alcohol content regarding improper collection, improper preservation, handling and testing of her blood specimens. In this regard the Petitioner met the required threshold of objections *"beyond mere boilerplate,"* and it was the Commonwealth's burden to refute the Petitioner's evidence and prove that the reported BAC was accurate and reliable.

Specifically, the expert witness testified that 1) an improper blood alcohol kit was used that only contained 20mg. of sodium fluoride *whereas in the Petitioner's instant case where testing was delayed for more than 48 hours, 100mg. should have been used to prevent the Petitioner's blood from decaying, fermenting and producing its own alcohol unrelated to consumption*; 2) the arresting officer's shaking of the blood specimens after they were collected, in the absence of appropriate standards and

training, contrary to the manufacturer's instructions, in the mistaken belief that he was ensuring that they were mixed properly ~~actually caused~~ a breakdown of the red cell membranes (a condition termed hemolysis) which alters the blood chemistry and produces an unreliable BAC result; 3) that the lack of appropriate refrigeration during storage and shipment for testing, in the absence of proper level of preservative allowed the bacteria in the blood to decay and overtake the preservative, produce its own alcohol that would be indistinguishable from alcohol consumed and reported as total alcohol on the BAC report; 4) that there were flaws in the change of custody in that the specimen was taken back to the police station and left unattended overnight on the desk of a secretary for further mailing to the Erie Crime Laboratory for testing; 5) that the Petitioner's legal blood alcohol specimen was not properly pretested consistent with applicable laboratory standards; and 6) that once the Petitioner's submitted blood specimen tested positive for alcohol content, the laboratory did not, consistent with best practices, perform a confirmatory test using a different scientific principle to confirm the presence and quantity of the blood alcohol content. (Appendix F)

At the conclusion of the suppression hearing the attorney for the Commonwealth of Pennsylvania indicated that he was not prepared to respond to Petitioner's evidence and asked for a continuance. The suppression court judge concurred and granted the Commonwealth attorney 25 days to respond after the Petitioner's attorney's 20 days to file a motion brief for dismissal of the blood evidence.

The Petitioner's motion brief to dismiss the blood evidence was filed on February 20, 2003 and on March 11,

2003 the Commonwealth attorney filed a response indicating that the Commonwealth was unaware it had any burden to produce evidence at the initial suppression hearing but conceded that the Petitioner had raised "specific allegations" of testing errors which now must be responded to by the Commonwealth and asked for more time to respond.

Instead, the suppression court judge, who was also scheduled to be the trial judge issued a ruling on May 29, 2003 denying the Petitioner's motion to suppress by stating that he found that the Commonwealth sustained its burden of proof from a prima facie evidentiary standpoint and did not find the Petitioner's expert witness credible enough to require the Commonwealth to present further testimony. (Appendix B)

The suppression court's ruling to deny the Petitioner's motion to suppress the blood evidence was contrary to the facts and evidence on the record, inconsistent with procedural requirements of the burden of proof and the Commonwealth's own acknowledgement of that burden and represented an abuse of judicial discretion that favored the prosecution and was prejudicial to the defendant's rights.

On November 12, 2003, Petitioner was found *"not guilty"* by a jury of 75 Pa. C.S. 3731(a)(1) driving under the influence of alcohol to a degree which renders the person incapable of safe driving. However, based on the reported blood alcohol content, the jury found Petitioner *"guilty"* of 75 Pa. C.S. 3731(a)(4) driving with a blood alcohol greater than 0.10%. The penalties are the same and the Petitioner was sentenced by the trial court on January 21, 2004.

A timely appeal was filed with the Pennsylvania Superior Court which was the last and highest court to rule on the merits. On September 22, 2005, the Pennsylvania Superior Court upheld the decision of the suppression court and affirmed the Petitioner's judgment of sentence. (Appendix A)

The Pennsylvania Superior Court, in its decision affirming the conviction of the Petitioner on the basis of the challenged legal blood test misrepresented the Petitioner's basis of conviction and side-stepped all of the legal issues presented by Petitioner that included Pennsylvania not following it own laws, that Petitioner's legal blood specimen was not properly preserved or handled and the suppression court's decision not to suppress the blood evidence was a judicial abuse of discretion not supported by the facts on the record.

Petitioner was subjected to erroneous conclusions given the facts of the case based on inaccurate perceptions that blood tests are routine and basic and therefore automatically reliable. This was underscored by the Superior Court's reference to *Commonwealth v. Sullivan*, 581 A.2d 956, 958 (Pa. Super. 1990) that held, *"In general, BAC tests are basic and routine and therefore, highly reliable."* This assertion and perception is inaccurate if the blood specimen is not collected, preserved, handled and tested consistent with acceptable laboratory standards and simply ignores the facts in Petitioner's case.

In its Opinion, the Pennsylvania Superior Court limits the basis for it's affirmation of the judgment of sentence by citing Pennsylvania Statutes that blood tests are admissible as evidence if they were conducted by qualified persons using approved equipment and further that chemical tests of blood or urine shall be performed by a clinical laboratory

licensed and approved by the Pennsylvania Department of Health.

This is a very selective citing of Pennsylvania Statutes that only addresses what happens to the blood specimen after it reaches a laboratory for testing. The Pennsylvania Superior Court simply ignored other relevant Pennsylvania Statutes that address how the specimen is to be preserved *before* it reaches the laboratory in that testing is only to be performed on properly preserved specimens. (Appendix E) The Pennsylvania Superior Court also ignored that Pennsylvania has not developed any standards to ensure the blood specimen's integrity through proper preservation and handling of the blood specimen before it reaches the laboratory.

In its decision, Pennsylvania Superior Court stated that, *"We have previously rejected attempts to increase the Commonwealth's burden with respect to validating test results in DUI cases."* (Appendix A – App. 11)

However, the burden to ensure accuracy and reliability of the legal BAC test result already exists under existing Pennsylvania Statutes, particularly when appropriate and specific challenges are raised *"beyond boilerplate."* Petitioner has demonstrated through the facts in the instant case that the Commonwealth of Pennsylvania did not meet this burden due to the lack of statewide standards, policies and training resulting in the use of inadequate preservative and mishandling of the legal blood alcohol specimen and a reported BAC level that was inaccurate and unreliable.

Additionally, the Commonwealth of Pennsylvania was relieved of the responsibility and burden to address the issues raised by Petitioner by the suppression court declaring Petitioner's issues as not being credible.

The legal blood alcohol kits containing the proper level of 100mg. of sodium fluoride cost exactly the same as the 20mg. kits and the proper training of police officers would be at minimal cost, thus the cost of ensuring an accurate and reliable legal blood alcohol test result is not an excessive cost to the Commonwealth of Pennsylvania.

The Superior Court, in his decision affirming the trial court's ruling of not suppressing the challenged legal BAC result, relied on its previous rulings and continued to erroneously state, *"Furthermore, we have held that the blood test result, not the test sample, is the material evidence which is determinative of a defendant's guilt or punishment."* (Appendix A – App. 5)

This is an unbelievable statement by a judicial body that simply and grossly ignores that the accuracy of the blood test result depends solely on if the blood specimen is collected, preserved, mixed, handled and tested properly. This lack of understanding, especially in the absence of statewide standards is, not only inaccurate and prejudicial to the Petitioner, but continues to negatively impact countless innocent people that are being arrested, prosecuted and convicted on the basis of a improper legal blood alcohol test.

The Pennsylvania Superior Court, in its decision affirming the suppression court's ruling simply ignored that Petitioner had met the burden of providing specific allegations of testing errors, and not general boilerplate objections to the admission of the test results and the Commonwealth's acknowledgement of its burden to prove the reported prima facie blood alcohol evidence was reliable and accurate.

The Superior Court stated, "*Following a careful review of the evidence presented by both the Commonwealth and Appellant regarding the handling and testing of Appellant's blood sample, the trial court, in a well-reasoned, thorough opinion, found the testimony of Appellant's expert to be incredible and that* '(e)ven though the defendant brought forth an expert for the purpose of indicating possible errors with the collection and testing of the sample, the Court does not feel that this testimony has risen to the level of credibility that would require suppression.'"

How much more credible is citing existing Pennsylvania Statutes, applicable laboratory standards and demonstrating that in the Petitioner's case, these statutes and standards were not met.

In fact, the Commonwealth never presented any evidence, other than the prima facie results of the BAC test. And there was no "*well reasoned or thorough suppression court opinion.*" The suppression court judge simply declared that the Commonwealth did not have to respond by deeming the Petitioner's expert witness and evidence as not credible.

Superior Court stated, "*Because we find the record before us supports the trial court's holdings with respect to its suppression ruling, we find no basis upon which to disturb it.*" (App. 12) In fact, the only evidence on the record was that of the Petitioner's expert forensic toxicology witness.

Finally, in a closing footnote (App. 13), the Superior Court, in reference to the jury decision on the blood evidence, makes an error of fact by stating, " . . . *our review of the record leads us to conclude that the jury, which was*

free to believe all, part, or none of the evidence, simply credited the substantial evidence presented by the Commonwealth, and not the Appellant. . . ."

This statement by the Pennsylvania Superior Court ignored the fact that the jury acquitted Petitioner of driving while intoxicated and the only evidence regarding the legal blood alcohol test was its prima facie BAC. This is not substantial evidence on the record.

Petitioner filed a timely Petition for Allowance of Appeal with the Pennsylvania Supreme Court which was denied on March 14, 2006.

Petitioner filed a timely Petition for Reconsideration for Allowance of Appeal from the Order of the Superior Court which was denied on May 25, 2006.

REASONS FOR GRANTING THE PETITION

Petitioner had challenged the accuracy and reliability of the alleged blood alcohol specimen through facts on the record and expert forensic evidence and testimony. The suppression court, in an abuse of judicial discretion, denied suppression and the inaccurate blood evidence was introduced at Petitioner's trial. Petitioner was ultimately found innocent by jury of driving under the influence. However, based on the alleged BAC Petitioner was found guilty of driving with a blood alcohol content over the legal limit.

I. Petitioner was denied equal protection since Pennsylvania has failed to promulgate appropriate rules and regulations regarding the proper collection, preservation and testing consistent with its own statutes to ensure the accuracy and reliability of the reported blood alcohol content.

This failure of the Commonwealth of Pennsylvania results in arbitrary and disparate treatment of individuals arrested for suspicion of being intoxicated. The **Pennsylvania Department of Health** simply ignores its obligations and responsibilities under **28 Pa. Code, § 5.44(a)** and **75 Pa. C.S. 1547(c)(2)(ii)** (Appendix E) by referencing its adherence to **28 Pa. Code, § 5.62**.

"Results of proficiency tests shall be maintained in the acceptable ranges statistically determined for each evaluation. Failure of a laboratory to satisfactorily perform in a proficiency test may be cause for revocation of approval of the specific test involved." 28 Pa. Code, § 5.62.

In other words, laboratories within Pennsylvania are approved to perform legal blood alcohol tests based on being sent *"control samples"* and simply achieving test results statistically within an acceptable range. While this is an important component of a quality assurance and approval process, it falls short of recognizing that legal blood specimens being sent in from 2000 plus police jurisdictions in the field are not control specimens in which the level of blood alcohol is previously established.

Field legal blood alcohol specimens must be preserved, mixed, and handled properly in order to prevent the collected specimen from decaying; fermenting and producing its own

alcohol that would be indistinguishable from alcohol consumed and reported as total alcohol.

In the absence of any statewide standards one can look to other accepted scientific and laboratory sources to determine the proper collection, preservation, handling and testing of the legal blood alcohol specimen.

Ironically, the appropriate legal blood alcohol collection and toxicology testing standards can be found in *Blood Alcohol Analysis in the Clinical Laboratory – Approved Guidelines 1997, developed by the National Committee for the Consensus of Laboratory Standards (NCCLS)* of which the Pennsylvania Department of Health is a member and whose representative served on the NCCLS committee that developed the standards.

As a result of failure to act, some of the 2000 police jurisdictions in Pennsylvania are using a legal blood alcohol kit that only contains 20mg. of sodium fluoride as a preservative, while others are using 100mg. (which is the standard); police officers, in the absence of standards and proper training are shaking the legal blood specimen after it has been collected in the mistaken belief they are helping to mix it, thereby altering the blood chemistry and subsequent test results; some police jurisdictions are refrigerating the collected legal blood specimen prior to testing, while others are not; some approved laboratories are pretesting the submitted legal blood alcohol specimen prior to testing, while others are not and some approved laboratories are performing a confirmatory test while others are not. (Appendix F)

This is an unequal and unjust application of due process which violates equal protection. In the absence of necessary and appropriate statewide standards, the

arrest, prosecution and conviction of a resident and traveler within Pennsylvania suspected of DUI depends on what police jurisdiction they are in, what blood alcohol kit that police jurisdiction happens to use, whether or not it was properly mixed and handled and whether or not the approved laboratory performed a pretest and a confirmatory test.

Pennsylvania has a valid state interest of public policy and public safety, as well as retaining access to federal highway funds in arresting, prosecuting and convicting drunk drivers. However, that interest cannot override the fundamental constitutional protections of due process and equal protection.

Obviously, the Equal Protection Clause cannot mean that government is obligated to treat all persons exactly the same, only that it is obligated to treat people the same if they are *"similarly circumstanced."*

Individuals that are arrested for suspected drunk driving are *"similarly circumstanced"* and yet many are treated differently in that the accuracy of the legal blood alcohol test is dependent on what state they reside in; what county within that state and if the proper legal blood alcohol kit was used and if the blood specimen was handled and tested properly.

This represents unjustifiably disparate standards applied in different counties with the Commonwealth of Pennsylvania to otherwise identical facts. And these differences are wholly arbitrary.

In *Bush v. Gore*, 531 U.S. 98 (2000), this Court held that the absence of specific uniform standards for manual vote recounts, especially where the evidence shows that vote

counting standards varied or changed within counties violated the Equal Protection Clause. Petitioner respectfully submits that the lack of specific uniform standards for the collection, preservation, handling and testing of the legal blood alcohol specimen prior to testing, especially when the evidence shows that the procedures used vary or change by state and by county violates the Equal Protection Clause.

These disparities and arbitrary actions which deprive innocent people of their liberty and subjects them to significant economic penalties calls for a more searching judicial inquiry. It is inconsistent with the minimum procedures necessary to protect the fundamental rights of every citizen.

II. Petitioner was denied equal protection as the alleged BAC should have been dismissed as evidence by the suppression court because the record of evidence clearly demonstrated the blood specimen was improperly collected, preserved and tested inconsistent with Pennsylvania Statutes; and the Commonwealth requested and was denied the opportunity to respond to Petitioner's evidence.

Prejudicial error resulted from the admission at trial of a legal blood alcohol test result made inadmissible by state law. If state law requires a properly preserved legal blood alcohol specimen, a judge cannot ignore the facts on the record and arbitrarily characterize the Petitioner's evidence as being not credible.

The suppression court's ruling denying the Motion to Suppress was also inconsistent with its own instructions to the Commonwealth at the conclusion of the January 28,

2003 Suppression Hearing when it provided the Commonwealth forty-five days to consider producing evidence, testimony or witnesses for the record to rebut Petitioner's challenges to the blood evidence before it issued a ruling.

The prosecution filed a letter with the suppression court acknowledging its obligation to respond to the challenged legal blood alcohol evidence and asking for more time. When Petitioner's counsel contacted the suppression court's office concerning the schedule for another hearing, counsel was informed that the judge was not accepting any further delays and was going to issue a ruling.

The suppression court judge then ruled that the challenges to the evidence were not credible enough for the prosecution to respond to and that the evidence was admissible at trial. A desire for speed is not a general excuse for abridging due process and ignoring equal protection guarantees.

Incredibly, the suppression court ruled in its May 28, 2003 Opinion and Order (at Appendix B) that, *"It was only for the convenience of the defendant and her counsel and their assertions regarding spending money on an expert, when that expert's testimony may not be necessary, that the Court indicated those motions would be reserved until a later date."* (App. 14)

This statement by the suppression court not only ignores the right of the defendant to have a hearing and present challenges to the evidence but it underscores that the defendant was deprived of a fair and impartial hearing and subjected to the bias of the Court.

III. Petitioner was denied due process by the Pennsylvania Superior Court which ignored the facts of record in Petitioner's appeal and its own previous rulings on similar cases when it upheld Petitioner's conviction.

The Pennsylvania Superior Court had the authority and responsibility to correct the judicial error that permitted inadmissible evidence to be introduced at Petitioner's jury trial. The appeals panel is limited to a determination of whether the hearing justice's decision is supported by competent evidence. The panel may reverse a decision of a hearing judge, *"only where the decision is clearly erroneous in light of reliable, probative and substantial evidence, and where it is so arbitrary and capricious that it is characterized as an abuse of discretion."*

Instead, the Pennsylvania Superior Court sanctioned a departure from Pennsylvania Statutes, applicable administrative standards and validated a standardless system for evaluating the propriety of blood specimen collection, preservation, handling and testing for blood alcohol content in criminal prosecutions.

In upholding the suppression court's denial of the Motion to Suppress the challenged blood evidence, the Pennsylvania Superior Court ignored its own previous rulings cited in *Commonwealth v. Brown*, 631 A.2d 1014, 1018 (Pa. Super. 1983), which held, *"Only specific allegations of testing errors, and not general boilerplate objections to the admission of test results will require the Commonwealth to produce evidence of the test's reliability other than by reference to the Pennsylvania Bulletin."*

The Pennsylvania Superior Court also ignored its own previous rulings on the suppression issue as cited in *Commonwealth v. Serbek*, No. 510, Pittsburgh 1997 in

which it ruled, *"In reviewing the denial of a motion to suppress, our responsibility is to determine whether the record supports the suppression court's factual findings of the inferences and legal conclusions drawn from those findings. If the suppression court held for the prosecution, we will consider only the evidence of the prosecution's witnesses and so much of the evidence for the defense, as fairly read in the context of the record as a whole, remains uncontradicted. When the factual findings of the suppression court are supported by the evidence, the appellate court may only reverse if there is an error in the legal conclusions drawn from those factual findings."*

In the instant case, the prosecution's only evidence was the prima facie evidence of the Petitioner's blood alcohol content. The Petitioner, through a forensic toxicology expert witness challenged the accuracy and reliability of the prima facie evidence because it was improperly collected, preserved, handled and tested inconsistent with Pennsylvania Statutes and applicable laboratory standards.

The prosecution never presented any evidence to refute the Petitioner's evidence, although the prosecution did file a letter with the suppression court acknowledging its burden to do so.

The Pennsylvania Superior Court decision in Petitioner's case ignored the record and its own previous rulings on the issue of suppression.

IV. Petitioner's challenges to the accuracy and reliability of the alleged BAC are consistent with state and federal and national laboratory standards.

It is simply erroneous to believe that since blood tests have been around for a long time, they are fairly basic and therefore must be accurate and reliable. The accuracy and reliability of a blood alcohol test is dependent on the proper collection, preservation, handling and testing of the blood specimen before it is tested.

The appropriate legal blood alcohol collection and toxicology testing standards can be found in **Blood Alcohol Analysis in the Clinical Laboratory – Approved Guidelines 1997**, developed by the **National Committee for the Consensus of Laboratory Standards (NCCLS)**.

This forty-two page document represents a comprehensive analysis of the proper collection, preservative, handling and testing of the legal blood alcohol specimen. It also recognizes the differences in legal blood alcohol specimens that are collected and tested immediately versus those specimens in which testing will be delayed and thus require a higher level of preservative and/or refrigeration.

The Pennsylvania Department of Health is a member of the NCCLS and its Director of Chemistry and Toxicology served on the seven member committee that developed the standards in 1997, yet these appropriate laboratory standards were never adopted nor implemented in Pennsylvania.

It is also instructive to look to the **United States Food and Drug Administration (FDA) Standards**

regarding the proper legal blood alcohol kits. The reference is found in the **FDA Database of Recognized Consensus Standards – dated August 14, 1998, Recognition List Number 002-Devices Affected: Blood Alcohol Testing, Process 510(k)**. In the cited reference, the FDA bases its approval protocol of blood Vacutainer kits on the **NCCLS 1997 – Approved Guidelines** and lists the manufacturers and approved legal blood alcohol kits that contain 100mg. of sodium fluoride as the preservative to prevent the decay and fermentation of legal blood specimen from producing its own alcohol. (Appendix E)

The record of evidence in this case clearly demonstrates that collection, preservation, handling and testing of the Petitioner's legal blood specimen was inconsistent with applicable Pennsylvania Statutes, to the extent they exist, and inconsistent with applicable laboratory standards requiring 100mg. of sodium fluoride as a preservative. This failure in process and procedure allowed Petitioner's blood specimen to decay and ferment producing its own alcohol that was indistinguishable from alcohol consumed and reported as total BAC.

It can also be correctly argued that this lack of equal protection and due process violation exists, not just within Pennsylvania but, throughout the United States. There are no uniform or consistent standards regarding how a legal blood alcohol specimen is collected, preserved, handled or tested in order to determine if the individual's blood alcohol level is at, below or above the federally mandated level of .08%.

When the federal government gave states until September 30, 2003 to adopt the lower level of .08% BAC for public safety reasons or be penalized with the loss of

federal highway funds, it also cautioned states that their breath testing machines must be scientifically reliable. Yet, no mention was made of ensuring that the legal blood alcohol test be reliable and accurate.

California, in its Physical Evidence Bulletin issued by the California Department of Justice actually requires, as does Idaho, Wisconsin, Maryland, Ohio and Florida, the use of 100mg. of sodium fluoride as the preservation and notes that the use of other legal blood alcohol kits (i.e., the 20mg. kit) may be subjected to legal challenges. It also notes that the 100mg. kit has passed quality assurances measures.

CONCLUSION

Petitioner, Robin E. Polito, understands and agrees that it is in the best interest of public policy and safety to aggressively arrest, prosecute and convict drunken drivers.

This request for a Writ of Certiorari does not imply disrespect for the serious issues associated with drunk driving or the many issues law enforcement agencies and the courts must contend with on these issues but rather a respect for the constitutional issues of equal protection and due process.

Given the serious penalties associated with being convicted of being DUI, including jail time, the wearing of an ankle bracelet, probation, mandatory attendance in drug and alcohol counseling, fines, costs, loss of license and possible loss of employment, in addition to the public embarrassment and emotional toll, the Petitioner believes

the procedures used in the collection, preservation, handling and testing should be consistent with existing Pennsylvania Statutes and applicable laboratory standards to ensure that the reported BAC test result is accurate and reliable.

Petitioner has been subjected to pre-existing bias and prejudices that surround being charged with being DUI. The facts in Petitioner's case have been ignored or misrepresented in order to sustain a conviction. It represents a miscarriage of justice to the extent that shocks one's sensibilities. The underlying facts in Petitioner's case go beyond the instant case and affect countless thousands of innocent people annually that are being arrested, prosecuted and convicted of being DUI, along with the guilty, on the basis of an unreliable and inaccurate legal blood alcohol test.

While one may advance that the blood test is just one factor in a DUI conviction, it must be understood that field sobriety tests and the officer's observations are highly subjective. It is the results of the legal blood alcohol test that confirms the level of intoxication. In the instant case, Petitioner was found innocent of drunk driving but convicted of having a BAC over the legal limit based on a bad blood test.

In the law enforcement and judicial zeal to be hard on drunk drivers, constitutional shortcuts are being taken; relevant statutes and applicable laboratory standards are being ignored resulting in the conviction of innocent people along with the guilty.

Petitioner is not advocating being soft on drunk drivers nor increasing the burden on the law enforcement or judicial system to prove one guilty of being DUI. Petitioner believes that individuals should be found guilty of

DUI based on reliable and accurate BAC tests that are conducted in accordance with existing laws and appropriate laboratory procedures.

This is about fundamental fairness and the need for procedural fairness and accuracy.

Petitioner seeks to vacate her conviction on 75 Pa. C.S. 3731(a)(4)(i) driving, operating or being in actual physical control of the movement of a vehicle while the amount of alcohol by weight in the blood of an adult is 0.10% or greater and, in as much as a jury has already acquitted Petitioner of 75 Pa. C.S. 3731(a)(1) driving, operating or being in actual physical control of the movement of a vehicle while under the influence of alcohol to the degree which renders the person incapable of driving, all further proceedings dismissed.

Petitioner is reminded of the following quote that applies in the instant case.

"There is no greater tyranny than that which is exercised under the cover of law and with the colors of justice. . . ." U.S. v. Jannottie, 673 F.2d 578, 614 (3rd Cir. 1982)

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ROBIN ELAINE POLITO, *Petitioner, Pro Se*
2921 Broad Avenue
Altoona, Pennsylvania 16601
(814) 942-3318

Date: August 3, 2006

APPENDIX A

J-A18024-05

NON-PRECEDENTIAL IJIECISION [sic] – SEE SUPERIOR COURT LO.P. 65.37

COMMONWEALTH OF PENNSYLVANIA,	:	
Appellee	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
ROBIN E. POLITO,	:	
Appellant	:	

No. 151 W DA 2004

Appeal from the Judgment of Sentence Entered January 21, 2004, In the Court of Common Pleas, Criminal Division Jelferson [sic] County, No. 394-2002

BEFORE: MUSMANNO, TODD, and BOWES, JJ.

MEMORANDUM:

FILED: SEPTEMBER 22, 2005

Robin Polito appeals the judgment of sentence of two years restrictive intermediate punishment, of which the first two days are to be spent incarcerated, and the next 15 days spent under electric monitoring, plus fees, costs, attendance at an alcohol treatment program, and installation of an ignition interlock device on each motor vehicle owned by her.

This judgment of sentence was entered January 21, 2004 by the Honorable John H. Foradora of the Jefferson County Court of Common Pleas following Appellant's conviction by a jury on November 12, 2003 of driving

under the influence of alcohol ("DUI"), 75 Pa.C.S.A. § 3731(a)(4).[1] We affirm.

The relevant facts of this matter were briefly summarized by Judge Foradora in his Opinion and Order of December 18, 2002 written in support of his denial of Appellant's Pre-Trial Omnibus Motion, as follows:

J-A18024-05

On May 7, 2002 Brookville Police Department Sergeant Kevin Bickle was dispatched by emergency services to investigate a report of an allegedly intoxicated female at Mike's Comet in Brookville Borough, Jefferson County. While en route, Sergeant Bickle received continuing information that the allegedly intoxicated female had vacated the store, got into a green Hyundai and left the area. As well, the vehicle[']s license plate was obtained and relayed to the officer. Moments later, a vehicle matching the description of the vehicle came toward the officer as he drove in the opposite direction. As he approached, the vehicle swerved into the opposite lane. The officer made a U-turn and proceeded to stop the vehicle. The [Appellant] was subsequently arrested for Driving Under the Influence of Alcohol, and Driving on the Right Side of the Roadway.

(Trial Court Opinion, 12/18/02, at 1.)

---

[1] We note that Section 3731 was repealed effective February 1, 2004 and Section 3802 adopted in its place. Because Appellant's charges were brought prior to February 1, 2004, we discuss her claims based on the prior statute.

Following Appellant's arrest, Officer Bickle transported her to Brookville Hospital, where blood was drawn for blood alcohol testing. Tests at the state police crime lab in Erie yielded a blood alcohol content ("BAC") of .26.

Following the denial of various pre-trial motions filed by Appellant, including a motion to dismiss the criminal complaint pursuant to Rule 519(B)(2) of the Pennsylvania Rules of Criminal Procedure, a motion to suppress based on the alleged illegal stop of Appellant's vehicle by Officer Bickle, and a motion to suppress based on an allegedly improperly obtained and tested blood sample, Appellant proceeded to a jury trial on November 11, 2003.

Following sentencing on January 21, 2004, Appellant timely appealed, presenting the following questions for our consideration, which we have paraphrased:

> I Whether the trial court erred by denying Appellant's Motion to Dismiss with Prejudice, pursuant to Pa.R.Crim.P. 519(B)(2), when the criminal complaint was filed without – 2 –]-A18024-0S justification 16 days beyond that date required by the rule?
>
> II. Whether the trial court erred by denying Appellant's Motion To Suppress based on the illegal stop of Appellant's automobile?
>
> III. Whether the trial court erred by denying Appellant's Motion to Suppress the Results of Appellant's Blood Alcohol Content based on an improperly obtained and tested blood sample?
>
> IV. Whether the jury's verdict was against the weight of the evidence? (Appellant's Brief at 4.)

Appellant first claims that the trial court erred by denying her motion to dismiss the criminal complaint filed against

her pursuant to Pa.R.Crim.P. 519(B)(2) because it was filed 11 days after the time limit required by the rule. (Appellant's Brief at 13.) She argues that because Officer Bickle arrested her on May 7, 2002, but did not file a criminal complaint against her until May 23, 2002, thereby constituting a violation of the 5-day limit prescribed by Rule 519(B)(2), the complaint against her should have been dismissed. *(Id.)*

Rule 519, Procedure in Court Cases Initiated by Arrest Without Warrant, provides, in relevant part:

(B) Release

(1) When the arresting officer deems it appropriate, the officer may promptly release from custody a defendant who has been arrested without a warrant, rather than taking the defendant before the issuing authority, when the following conditions have been met:

(a) the most serious offense charged is a misdemeanor of the second degree;

(b) the defendant is a resident of the Commonwealth;

(c) the defendant poses no threat of immediate physical harm to any other person or to himself or herself;

(d) the arresting officer has reasonable grounds to believe that the defendant will appear as required; and

(e) the defendant does not demand to be taken before an issuing authority.

(2) When a defendant is released pursuant to paragraph (B)(1), a complaint shall be filed

> against the defendant within 5 days of the defendant's release. Thereafter, a summons, not a warrant of arrest, shall be issued and the case shall proceed as provided in Rule 510.
> Pa.R.Crim.P. 519(B).

The trial court, relying on our decision in ***Commonwealth v. Demis***, 588 A.2d 30, 32-33 (Pa. Super. 1991), correctly stated that dismissal of a complaint for violation of Rule 519(B) "is inappropriate unless the defendant is prejudiced by the delay," and determined that Appellant had suffered no actual prejudice by the delay. (Trial Court Opinion, 12/18/02, at 1).

Appellant argues that she was prejudiced because had she known a criminal complaint would be filed against her, she might have requested the blood sample taken at the hospital on the night of her arrest for her own testing. The trial court held, however, and we agree, that under our decision in ***Demis***, Appellant had no statutory right to custody of her actual blood sample for independent analysis or testing. (Trial Court Opinion, 12/18/02, at 2.)

Furthermore, we have held that the blood test result, and not the test sample, is the material evidence which is determinative of a defendant's guilt or punishment. **See** ***Commonwealth v. Gamber***, 506 A.2d 1324, 1328 (Pa. Super. 1986); **see *also* *Commonwealth v. Tillia***, 518 A.2d 1246, 1252 (Pa. Super. 1986).

Accordingly, because Appellant has failed to demonstrate actual prejudice from the delay in filing criminal charges against her, we affirm the trial court's determination in this regard.

Appellant next an-ues [sic] that because "the facts and circumstances known and articulated by [Officer] Bickle

were insufficient to establish probable cause that a violation of the Motor Vehicle Code occurred," the stop of her vehicle was illegal and all evidence deriving therefrom should have been suppressed. (Appellant's Brief at 16.)

In reviewing an order denying a motion to suppress evidence, we must determine whether the factual findings of the trial court are supported by the evidence of record. In making this determination, this Court may only consider the evidence of the Commonwealth's witnesses, and so much of the evidence for the defendant, as fairly read in the context of the record as a whole, as remains uncontradicted. If the evidence supports the findings of the trial court, we are bound by such findings and may reverse only if the legal conclusions drawn therefrom are erroneous.

Commonwealth v. Ingram, 814 A.2d 264, 269 (Pa. Super. 2002) (citations omitted).

As a reviewing court, this Court is not bound by the legal conclusions of the suppression court and must reverse that court's determination if the conclusions are in error or the law is misapplied.

Commonwealth v. AlbErt, 767 A.2d 549, 552 (Pa. Super. 2001). In order for a traffic stop to be justified, a police officer must have probable cause to believe that a violation of the Motor Vehicle Code or regulations has taken place.

Commonwealth v. Battaglia, 802 A.2d 652, 656 (Pa. Super. 2002).

We find the officer had sufficient probable cause in the instant case. Appellant argues Officer Bickle's decision to effect a traffic stop was "based on a momentary and minor crossing of the center line," it therefore was illegal. (Appellant's Brief at 16.) The trial court held, however, that

Officer Bickle stopped Appellant/s vehicle based on much more than just a momentary and minor crossing of the center line and, in view of the totality of the circumstances, the officer possessed reasonable suspicion to effect a stop of Appellant's vehicle when he observed her cross over the center line. (Trial Court Opinion, 12/18/02, at 2.)

It is well-settled that "when police stop a vehicle in this Commonwealth for investigatory purposes, the vehicle, and its occupants are considered 'seized' and this seizure is subject to constitutional constraints.1 |

Commonwealth v. Knotts, 663 A.2d 216, 218 (pa. Super. 1995).

An investigatory stop of 2tvehicle [sic] is justified only when it is based upon objective facts creating a reasonable suspicion that the vehicle's occupants are presently involved in criminal activity. ***Commonwealth v. Valenzuela***, 597 A.2d 93, 98 (Pa. Super. 1991). To meet this standard, the officer must point to specific articulalJle [sic] facts which, together with the rational inferences derived therefrom, reasonably warrant the intrusion. ***Commonwealth v. Williams***, 615 A.2d 416" 419 (Pa. Super. 1992).

To possess reasonable suspicion, police officers need not personally observe the illegal or suspicious conduct, but may rely upon the information of third parties, including "tips" from citizens.

Commonwealth v. Wright,
672 A.2d 826, 830 (Pel. [sic] Super. 1996). If a tip has a low degree of reliability, more information will be required to establish the requisite level of suspicion than would be required if the tip were more reliable.

Commonwealth v. Ogborne, 599 A.2d 656, 659 (Pa. Super. 1991).

In ***Commonwealth v. Wilson***, 622 A.2d 293 (pa. Super. 1993), we examined the requirements surrounding reasonable suspicion for vehicle stops based on information provided by a tipster. There, we determined that reasonable suspicion, like probable cause, is dependent upon both the content of information possessed by police and its degree of reliability. We determined that both factors, quantity and quality, are to be considered in the totality of the circumstances that must be taken into account when evaluating whether there is reasonable suspicion.

Thus, if a tip has a relatively low degree of reliability, more information will be required to establish the requisite level of suspicion than would be required if the tip were reliable. ***Id.*** at 295-96.

Appellant argues, somewhat disingenuously, that the officer did not possess reasonable suspicion to perform an investigatory stop of her vehicle because she only had "crossed the double yellow line by two feet." (Appellant's Brief at 18.) Appellant further argues that Sergeant Bickle had been dispatched based on very limited information received from an anonymous caller at Mike's Comet, who reported an extremely intoxicated woman getting into a green Hyundai.

The Commonwealth points out, however, that the information provided to the dispatcher, including the observation of a severely intoxicated woman getting into a vehicle, coupled with a specific description of the vehicle and its license number, actually was telephoned in to 911 by a woman named Julie who identified herself as working in the *office* at Mike's Comet (Commonwealth's Briefr [sic]

at 8 n.2), and therefore that the "tip" in question was far more reliable than Appellant would have us believe.

The trial court determined that the reliability of the information provided to Sergeant Bickle by the dispatcher, coupled with Sergeant Bickle's personal observation of Appellant crossing the center double yellow line, created reasonable suspicion justifying the investigatory stop.

We agree and find, under the totality of the circumstances, that Sergeant Bickle possessed sufficient specific information to justify an investigatory stop of Appellant. Accordingly, the trial court properly denied Appellant's motion to suppress the evidence in this regard.

Next, Appellant argues that the trial court erred in denying her motion to suppress the results of her blood alcohol test because it was improperly drawn, preserved, and tested. (Appellant's Brief at 21.)

She argues that the trial court "ignored unrebutted expert scientific testimony that the Appellant's blood alcohol test result was inaccurate and unreliable due to specific errors and flaws in the collection, presentation, handling and testing of the blood specimen." *(Id.)*

Under 75 Pa.C.S.A,. § 1547, results of a chemical test are admissible as to show the BAC of a defendant charged with violating 75 Pa.C.S.A. § 3731 (driving under the influence of alcohol).

The pertinent portions of the statute, as defined at the time of the suppression hearing, state:

> (c) Test results admissible in evidence. – In any summary proceeding or criminal proceeding in which the defendant is charged with a violation

of section 3731 or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant's blood, as shown by chemical testing of the person's breath, blood or urine, which tests were conducted by qualified persons using approved equipment, shall be admissible in evidence.

* * *

(2) Chemical tests of blood or urine shall be performed by a clinical laboratory licensed and approved by the Department of Health for this purpose using procedures and equipment prescribed by the Department of Health. . . .

75 Pa.C.S.A. § 1547(c). In general, BAC tests are basic and routine and considered to be highly reliable. *Commonwealth v. Sullivan*, 581 A.2d 956, 958 (Pa. Super. 1990).

Section 1547(c)(2) provides that the tests be performed either at a laboratory licensed and approved by the Department of Health, or by a State Police criminal laboratory, and "[t]he Department's careful and thorough methods serve to [e]nsure that test results from an approved facility are valid and reliable"

Commonwealth v. Brown, *631* A.2d 1014, 1018 (Pa. Super. 1993). Approved facilities are listed in the Pennsylvania Bulletin. ***Id.*** at 1017. Publication in the Pennsylvania Bulletin and judicial notice thereof satisfy the requirements of 75 Pa.C.S.A. § 1547(c). ***Id.*** at 1018.

The Commonwealth may also establish the laboratory's approval and adequacy of methods, procedures, equipment, and personnel through testimony of witnesses. *Id.* at 1019, n.S.

> We previously have rejected attempts to increase the Commonwealth's burden with respect to validating test results in DUI cases.
>
> ***Commonwealth v. Judge***, 648 A.2d 1222, 1224, n.l (Pa. Super. 1994). Only specific allegations of testing errors, and not general, boilerplate objections to the admission of the test results, will require the Commonwealth to provide evidence of the test's reliability other than by reference to the Pennsylvania Bulletin. ***Brown***, 631 A.2d at 1018.
>
> In the absence of any specific allegation, the trial court will not speculate as to how the defendant's blood -;ample [sic] might have been rendered invalid. Judge, 648 A.2d at 1224 n.1.
>
> Our review of the record reflects that the laboratory in which the BAC analysis of Appellant's blood was performed was a state police criminal laboratory in Erie to which Sergeant Bickle mailed the samples drawn at the hospital.
>
> In response to Appellant's contentions that certain testing errors were made during the testing of her blood, the trial court conducted a separate hearing at which Appellant presented the testimony of an expert, Stanley Broskey, to discredit the procedures utilized by the state police in collecting and testing Appellant's blood alcohol level.

Following a careful review of the evidence presented by both the Commonwealth and Appellant regarding the handling and testing of Appellant's blood sample, the trial court, in a well-reasoned, thorough opinion, found the testimony of Appellant's expert to be incredible and determined that "[e]ven though the defendant brought an

expert for the purpose of indicating possible errors with the collection and testing of this sample, the Court does not feel that this testimony has risen to a level of credibility that would require suppression." concluded that (Trial Court Opinion, 5/28/03, at 6.)

The court further when looking at the evidence presented by the defendant as a whole, [the Court] believes that this evidence should be presented to a jury to ultimately decide the credibility of the Commonwealth and their testing procedures. None of these allegations rise to the level that causes the Court to require the Commonwealth to provide any more additional evidence to allow these tests to the finder of fact. It is ultimately for the finder of fact to determine whether Bickle or Brosius perverted the mixture or used improper collection techniques, not this Court at suppression. After ample consideration of [Appellant's] experts testimony, the Court does not believe the Commonwealth has to present any further evidence or detail to establish a *prima facie* case.

The trier of fact, in passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part, or none of the evidence presented. ***Commonwealth v. Hopkins***, 747 A.2d 910, 914 (Pa. Super. 2000).

We, as an appellate court, may not disturb those credibility determinations. Because we find that the record before us supports the trial court's holding with respect to its suppression ruling, we find no basis upon which to disturb it.

Finally, Appellant argues that the jury's verdict was against the weight of the evidence because "the jury incorrectly weighed the overwhelming and unrebutted

expert scientific evidence incorrectly and found Appellant guilty of §3731(a)(4) – BAC greater than .10°/0." (Appellant's Brief at 30.)

We note, however, that because Appellant failed to challenge the weight of the evidence at trial or in a post-trial motion, the argument has been waived. ***See*** Pa.R.Crim.P. 607 (challenge to weight of the evidence shall be raised with the trial judge prior to sentencing or in a post-sentence motion);

Commonwealth v. Widmer, 689 A.2d 211, 212 (Pa. 1997).[2]

Accordingly, we find no basis to disturb the jury's determination. For all of the foregoing reasons, we affirm Appellant's judgment of sentence.

Judgment of sentence **AFFIRMED**.

Judgment Entered:

Deputy Prothonotary

DATE: SEPTEMBER 22, 2005

---

[2] Were we to evaluate Appellant's claim on the merits, we note that although Appellant argues that the jury's verdict was erroneous based on the evidence presented, our review of the record leads us to conclude that the jury, which was free to believe all, part, or none of the evidence, simply credited the substantial evidence presented by the Commonwealth, and not Appellant, in determining that Appellant's blood alcohol content on the night in question was, in fact, greater than .10% while she was operatilng [sic] her vehicle.

APPENDIX B

COURT OF COMMON PLEAS
OF JEFFERSON COUNTY
PENNSYLVANIA
CRIMINAL

COMMONWEALTH OF PENNSYLVANIA, **Plaintiff,**	:	
vs.	:	**No. 394-2002 Cr.**
ROBIN E. POLITO, **Defendant.**	:	

OPINION AND ORDER

(Filed May 29, 2003)

J. FORADORA, P.J. May 28, 2003. This matter was originally before the Court on October 25, 2002 for Omnibus Pre-trial Motion filed by the defendant.

Prior to starting that hearing, defense counsel asked if the Court would bifurcate all motions regarding the suppression of the blood draw and blood alcohol testing as well as any sanctions for the failure of the Commonwealth to preserve the blood sample.

It was only for the convenience of the defendant and her counsel and their assertions regarding spending money on an expert, when that expert's testimony may not be necessary, that the Court indicated those motions would be reserved until later date.

At the hearing on October 24, 2002, the parties stipulated that the preliminary hearing transcript would be placed into evidence as Joint Exhibit #1, and the

District Attorney put on evidence concerning the other motions raised by the defendant. Hearing was held on the remaining motions on January 28, 2003.

This hearing was not a separate new hearing, but a continuation of the earlier Omnibus motion hearing. As such, the District Attorney had of record the *prima facie* evidence which he presented in front of District Justice Beck, as well as the additional evidence which was presented at the October 24, 2002 hearing. Because this information had already been presented, the Court simply turned to the defendant, having found that the Commonwealth sustained its burden of proof from a *prima facie* evidentiary standpoint. (*Prima facie* evidence was presented when totally considering the transcript of the preliminary hearing as well as the transcript of the October 24, 2002 Omnibus proceeding.)

Defense counsel now indicates that the Court changed the burden of proof when that was not in fact done. The bifurcated nature of these hearings were only done for the convenience of defendant and her counsel. The only issues left to present at the January 28, 2003 hearing were the defendant's objections to the blood testing, and as such the defendant had the burden of overcoming the Commonwealth's evidence, (which after presentation had to be taken in a light most favorable to the Commonwealth), and a finding that the Commonwealth had sustained their *prima facie* burden of proof. At the hearing the Court felt that everyone in the room understood the evidentiary status of the record, and proceeded from that standpoint. In summation, the Court did not change any burden of proof, persuasion, or presentation of evidence; but simply turned to the defendant to present the only evidence which was left outstanding after the initial Omnibus hearing.

Turning to the specific objections of the defendant on which the Court has yet to rule, the Court would first look to paragraph 27, wherein the defendant indicated:

> a) Brosius is not certified to perform the procedure resulting in the blood alcohol content determination; b) Brookville Hospital is not certified pursuant to the Clinical Laboratory Act; and c) the Erie Regional Crime Lab is not certified under the Clinical Laboratory Act.

With regard to the first issue, Superior Court has ruled the following:

> "We have reviewed the trial court's discussion of this issue and agree that 75 Pa.C.S.A. §1547(c) and 28 Pa. Code §5.24 and §5.1 focus on the qualifications of the person performing the blood testing and the equipment used, not the technician who drew the blood . . . the technician was qualified for his position by the hospital and withdrew the blood under police supervision. Under these facts, the only reason to call the technician who drew the blood would be to establish the chain of custody. However, as the trial court pointed out, when the police observe the technician drawing the blood, the Commonwealth is not compelled to called the technician." *Com. v. Mahaney,* 540 A.2d 556, 559-560 (Pa.Super 1988). See also *Com. v. Zelinski,* 573 A.2d 569, 573 (Pa.Super 1990).

The defendant has also raised the issue about Brookville Hospital not being certified pursuant to the criminal laboratories act. Our Superior Court has addressed this issue:

> "Regarding appellant's first argument in support of this issue, we have closely scrutinized §1547

> and cannot find a requirement that the facility where the blood is collected must be an approved facility. There is a requirement that the actual testing of the blood must be performed by a clinical laboratory licensed and approved by the Department of Health." *Com. v. Zelinski,* 573 A.2d 569, 573 (Pa.Super 1990).

Finally, the defendant contends that the Erie Regional Crime Lab is not certified under the Criminal Laboratories Act. This is true. However, 75 Pa.C.S.A. §1547(c)(2) indicates:

> "Chemical tests of blood or urine, if conducted by a facility located in this Commonwealth shall be performed by a clinical laboratory licensed and approved by the Department of Health for this purpose using procedures and equipment prescribed by the Department of Health ***or by a State Police criminal laboratory.***
>
> (Emphasis added).

In the case before the Court, the Pennsylvania State Police criminal laboratory analyzed the blood and as such was not required to be certified under the Clinical Laboratory Act. Case law has determined that neither the Brookville Hospital nor Brosius had to be certified in order to draw the blood, and as such, all motions regarding this issue are denied. Further, this test not taking place in a clinical laboratory, the clinical laboratory sections of the Pennsylvania Code would not apply to that crime laboratory, and as such, not result in suppression in this case.

In paragraph number 28 of her Omnibus Pre-trial Motion, the defendant raises three issues: a) Brosius cleansed the site of the venepuncture with either isopropyl alcohol or betadyne; b) Brosius failed to mix the blood

drawn and chemical preservatives pursuant to the instructions in the blood kit; and c) Bickle perverted proper mixing of the blood and preservative chemicals in the blood kit by shaking the vials two or three times. Further, the defendant alleges that the blood samples taken on May 7, 2002 were mailed by Bickle from the Brookville Police Department on May 8, 2002 and received by the Erie Regional Crime Lab on May 10, 2002, at which date they were tested. She further raises the issue that the blood was packaged and left in an unsecured location on top of the secretary's desk for mailing, and further that it was not refrigerated, and finally that there is not a continuous chain of custody to insure that the blood drawn from Polito was the indeed the same blood tested at the Erie Regional Crime Lab.

With regard to chain of custody, our Supreme Court has held as follows:

> "The law is clear that physical evidence may be properly admitted despite gaps in testimony regarding its custody. (Citations omitted) We have reasoned that gaps in the chain of custody go to the weight to be given to the testimony, not to its admissibility." *Com. v. Bolden*, 486 Pa. 383, 406 A.2d 333 (1979).

These rulings have further been expanded to indicate that physical evidence may be admitted at trial without demonstrating to an absolute certainty the precise chain of custody. See: *Com. v. Culmer,* 413 Pa.Super 203, 604 A.2d 1090 (1982). The defendant can point out to the jury by way of cross-examination or other testimony the gaps in the chain of custody, if this matter were to go to trial. For purposes of this Omnibus Pre-trial Motion and suppression of evidence, the Court does not find any gap occurred

by mailing the blood samples, which is so deficient as to require suppression.

Further, Sgt. Bickle testified at the preliminary hearing that he personally watched the blood being drawn, sealed the samples, and then packaged them for shipment to the Erie Crime Lab for analysis. See: Transcript of Preliminary Hearing, June 27, 2002, pages 15 & 16. Defendant has raised the issue that 28 Pennsylvania Code §54.2 does not allow for transportation of specimen through the U.S. Postal Service network. Title 28 of the Pennsylvania Code is titled Health and Safety, and these regulations deal with clinical laboratories, the definition of which is contained in Section 5.1. As discussed earlier in this Opinion, the Erie Crime Lab is not a clinical laboratory, and this blood is not being used for clinical purposes. Since the Vehicle Code specifically exempts the Pennsylvania State Police Crime Labs from meeting the requirements of clinical laboratories, these sections of the Pennsylvania Code have no application to the case before the Court where the blood was tested and evaluated by the Erie Crime Lab for blood alcohol content under 75 Pa.C.S.A. §1547.

The remainder of the issues to be decided in this suppression motion regard credibility issues for a jury or judge at trial much like the chain of custody issue addressed earlier. Even though the defendant brought an expert for the purpose of indicating possible errors with the collection and testing of this sample, the Court does not feel that this testimony has risen to a level of credibility that would require suppression. These issues can be placed before a jury or a judge as finder of fact to decide the ultimate issue of whether or not that expert is in fact credible. On an issue of suppression, if the Court found the

opinion of the expert to be credible, it could require the Commonwealth to present further testimony.

> "We believe this is what occurred in the *Culp* case. There, appellant alleged specific deficiencies in the testing process. The suppression Court evaluated the claims and found that their specificity warranted a *more detailed response* from the Commonwealth than mere reference to the Pennsylvania Bulletin. Therefore, the holding in *Culp* is not at odds with *Garofalo* or our decision today. It instead reflects a scenario possible in any case in which blood alcohol tests are offered as evidence: a party may convince the court that even though a lab has state approval, the circumstances surrounding his or her test were such that the results are not reliable. We caution, however, that only specific allegations of testing errors, to which the trial court gives credence, and not general boiler plate objections to the admission of test results, will mandate more than reference to the Pennsylvania Bulletin.
>
> *Com. v. Brown,* 631 A.2d 1014, 1018, (Pa.Super 1993). See also: *Com. v. Demark,* 800 A.2d 947 (Pa.Super 2002)

The Court, when looking at the evidence presented by the defendant as a whole, believes that this evidence should be presented to a jury to ultimately decide the credibility of the Commonwealth and their testing procedures. None of these allegations rise to the level that causes the Court to require the Commonwealth to provide any more additional evidence to allow these tests to the finder of fact. It is ultimately for the finder of fact to determine whether Bickle or Brosius perverted the mixture or used improper collection techniques, not this Court

at suppression. After ample consideration of this expert's testimony, the Court does not believe the Commonwealth has to present any further evidence or detail to establish a *prima facie* case.

Finally, the defendant has asked the Court to sanction the Commonwealth for failure to preserve the blood sample of the defendant for additional testing. This Court will not sanction the Commonwealth. See *Com. v. Demis*, 588 A.2d 30 (Pa. Super 1991).

ORDER

AND NOW, this 28th day of May 2003, for the reasons set forth in the foregoing Opinion,

IT IS HEREBY ORDERED AND DECREED that all the defendant's Omnibus Pre-trial Motions are **DENIED**.

BY THE COURT,

/s/ John H. Foradora
P.J.

APPENDIX C

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. ROBIN E. POLITO, Petitioner	:	No. 575 WAL 2005 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 14th day of March 2006, the Petition for Allowance of Appeal is hereby **DENIED.**

Madame Justice Baldwin did not participate in the consideration or decision of this matter.

APPENDIX D

IN THE SUPREME COURT OF PENNSYLVANIA WESTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent	:	No. 575 WAL 2005
v.	:	Application for Reconsideration of Petition for Allowance of Appeal from the Order of the Superior Court
ROBIN E. POLITO, Petitioner	:	

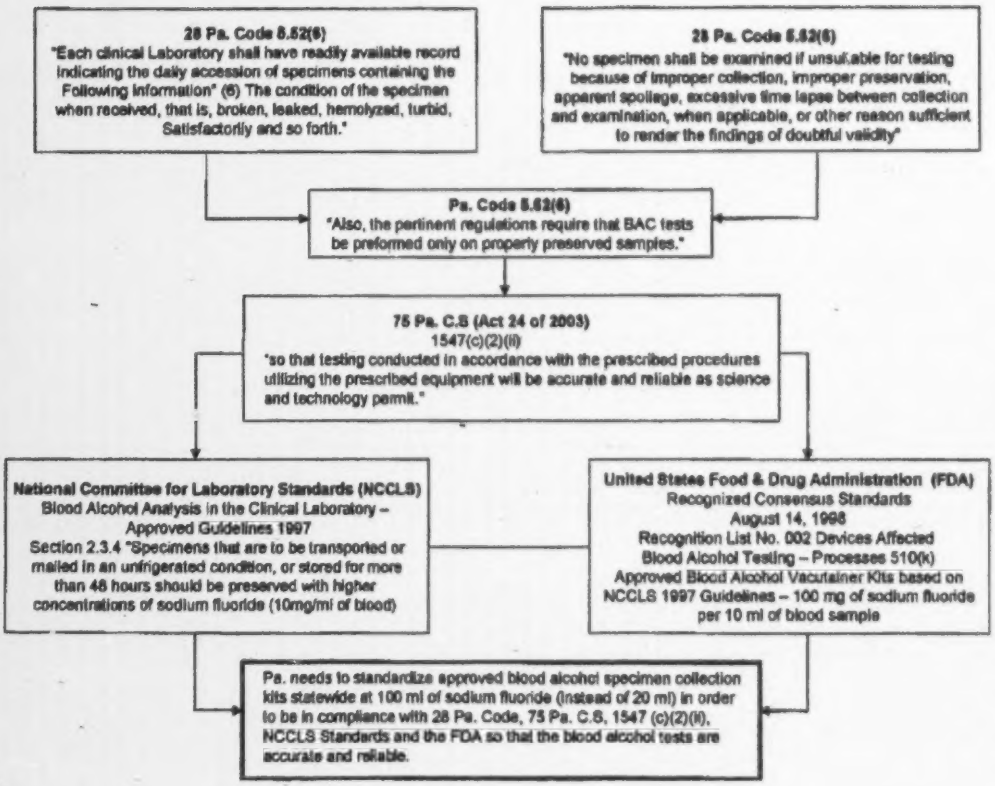
ORDER

PER CURIAM

AND NOW, this 25th day of May 2006, the Application for Reconsideration is hereby **DENIED.**

Madame Justice Baldwin did not participate in the consideration or decision of this matter.

APPENDIX E


28 Pa. Code 5.52(6)
"Each clinical Laboratory shall have readily available record indicating the daily accession of specimens containing the Following information" (6) The condition of the specimen when received, that is, broken, leaked, hemolyzed, turbid, Satisfactorily and so forth."
28 Pa. Code 5.52(6)
"No specimen shall be examined if unsuitable for testing because of improper collection, improper preservation, apparent spoilage, excessive time lapse between collection and examination, when applicable, or other reason sufficient to render the findings of doubtful validity"
Pa. Code 5.52(6)
"Also, the pertinent regulations require that BAC tests be preformed only on property preserved samples."
75 Pa. C.S (Act 24 of 2003)
1547(c)(2)(ii)
"so that testing conducted in accordance with the prescribed procedures utilizing the prescribed equipment will be accurate and reliable as science and technology permit."
National Committee for Laboratory Standards (NCCLS)
Blood Alcohol Analysis in the Clinical Laboratory – Approved Guidelines 1997
Section 2.3.4 "Specimens that are to be transported or mailed in an unfrigerated condition, or stored for more than 48 hours should be preserved with higher concentrations of sodium fluoride (10mg/ml of blood)
United States Food & Drug Administration (FDA)
Recognized Consensus Standards
August 14, 1998
Recognition List No. 002 Devices Affected
Blood Alcohol Testing – Processes 510(k)
Approved Blood Alcohol Vacutainer Kits based on NCCLS 1997 Guidelines – 100 mg of sodium fluoride per 10 ml of blood sample
Pa. needs to standardize approved blood alcohol specimen collection kits statewide at 100 ml of sodium fluoride (instead of 20 ml) in order to be in compliance with 28 Pa. Code, 75 Pa. C.S, 1547 (c)(2)(ii), NCCLS Standards and the FDA so that the blood alcohol tests are accurate and reliable.

APPENDIX F

Serious Errors and Flaws in Pa. BAC Collection, Preservation, Handling and Testing

Blood Alcohol Kit + Do Not Shake + Refrigerate + Shipment + Pretest Inspection + Test Technology = BAC Results

NIK Kit 4990 (legal blood alcohol kit and process being used in Pa. in absence of statewide standards)

20 mg. Sodium	Shaking causes	Lack of allows additional	Allows additional	Visual cannot identify	Gas Chromatography	Unspecific
Fluoride & 10 mg.	hemolysis which can	fermentation that	hemolysis &	hemolysis &	non-specific screening	Equivocal
EDTA	alter reported BAC	alters BAC	fermentation	microscopic clots	technology	Unreliable

NIK Kit 4994 (Proper legal blood alcohol kit and process consistent with NCCLS, FDA standards and Pa. Statutes)

100 mg. Sodium	No shaking - prevents	Refrigeration	Land route with	Microscopic	Gas Chromatography	Specific
Fluoride & 20 mg.	hemolysis which alters	prevents	refrigeration prevents	identifies clots	with Mass Spectrometry	Unequivocal
Potassium Oxalate	BAC	fermentation	hemolysis & fermentation	& hemolysis	99.8% accuracy	Quantitative

Regardless of the initial testing technology – a second confirmatory test should be done to verify and quantify the alcohol content.

1) NIK Kit 4994 is mandated by many states because it is consistent with NCCLS and FDA standards in preservative and anticoagulant levels in reducing fermentation and clots.
2) The use of NIK Kit 4994, still requires the safeguards of not shaking, refrigerating, land shipment and a need for microscopic pretesting.
3) The use of NIK Kit 4994 with gas chromatography alone with still only provide equivocal and unspecific reported BAC levels.
4) NIK Kit 4994 *with* handling safeguards and using gas chromatography *with* mass spectrometry will provide accurate, and reliable blood alcohol content (BAC).